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BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, et al.,
Petitioners,

DIVISION OF OIL, GAS AND MINING,
Respondent, and

ALTON COAL DEVELOPMENT, LLC, and KANE COUNTY, UTAH,
Intervenors-Respondents.

Docket No. 2009-019
Cause No. C/025/0005

PETITIONERS' MEMORANDUM IN RESPONSE TO THE MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT FILED BY KANE COUNTY, UTAH

In this memorandum Utah Chapter of the Sierra Club ("Sierra Club"), Southern Utah Wilderness Alliance ("SUWA"), Natural Resources Defense Council ("NRDC"), and National Park Conservation Association ("NPCA")(collectively, "Petitioners") respond to the facts

asserted and arguments advanced by Kane County, Utah, in its separate *Intervenor's Memorandum in Support of Respondent's Motion for Partial Summary Judgment*. Petitioners construe Kane County's memorandum to support in theory both the first and second motions for partial summary judgment which intervenor-respondent Alton Coal Development, L.L.C., ("ACD") filed in this proceeding on January 15, 2010. To the extent that Kane County's memorandum incorporates or reiterates the factual allegations or arguments contained in ACD's motions for summary judgment and supporting memoranda, Petitioners' incorporate by reference their responses to those assertions and arguments set forth in Petitioners' memorandum in opposition. Petitioners file this separate memorandum to address Kane County's separate assertions and arguments.

I.

This Board Has No Authority to Enter Summary Judgment In Formal Adjudicatory Proceedings Concerning Approval of Applications to Conduct Surface Coal Mining Operations

The statutes and regulations that govern (1) the powers and authority of this Board and (2) the conduct of formal adjudicative proceedings on administrative review of decisions of the Utah Division of Oil, Gas and Mining ("the Division") to approve applications for permits to conduct surface coal mining and reclamation operations collectively impose a mandatory, non-discretionary duty on this Board to conduct an evidentiary hearing upon the demand of any party to such proceedings. Evidentiary hearings are necessary to permit any requesting party to, among other things, cross-examine any other party and the witnesses who provide evidence at the behest of another party. Because this Board is obligated by statute to afford parties to formal adjudicatory proceedings the right of cross-examination, the Board has no authority, absent the

waiver of that right by all parties, to grant summary judgment to any party, either in whole or in part. Petitioners have not and will not waive their right to cross-examine in this proceeding.

This Board's authority to conduct formal administrative proceedings to review the Division's coal mining permit approval decisions is governed by Utah Code § 40-10-6.7(2), which provides that:

> (a) (I) Formal adjudicative proceedings shall be conducted by the division or board under this chapter and shall be referred to as hearings or public hearings.
> (ii) The conduct of hearings **shall be governed by rules adopted by the board** which are in accordance with Title 63G, Chapter 4, Administrative Procedures Act.
> (b) Hearings under this chapter **shall be conducted in a manner which guarantees** the parties' due process rights. This includes:
> (I) the right to examine any evidence presented to the board;
> (ii) **the right to cross-examine any witness**; and
> (iii) a prohibition of ex parte communication between any party and a member of the board.
> (c) A verbatim record of each public hearing required by this chapter shall be made, and a transcript made available on the motion of any party or by order of the board.

(Emphasis supplied.) Additionally, Utah Code § 40-10-14(3), which also governs proceedings following a decision of the Division to approve a coal mine permit application, provides as follows:

> Upon approval of the application, the permit shall be issued. If the application is disapproved, specific reasons shall be set forth in the notification. Within 30 days after the applicant is notified of the final decision of the division on the permit application, the applicant or any person with an interest which is or may be adversely affected may request a hearing on the reasons for the final determination. **The board shall hold a hearing pursuant to the rules of practice and procedure of the board** within 30 days of this request and provide notification to all interested parties at the time that the applicant is notified. Within 30 days **after the hearing** the board shall issue and furnish the applicant, and all persons who participated in the hearing, with the written decision of the board granting or denying the permit in whole or in part and stating the reasons.

(Emphasis supplied.)

Read together, these statutes require this Board to afford all litigants in formal adjudicative proceedings such as this one the opportunity to cross-examine other parties and any witness who provides evidence on behalf of another party. This obligation precludes the Board from awarding summary judgment to any party that, as ACD and Kane County have done in this proceeding, unilaterally attempts to avoid an evidentiary hearing on any issue by presenting evidence through one-sided affidavits or declarations.

The fact that summary judgment procedure allows a party that opposes summary judgment to present counter-affidavits or declarations does nothing to cure the fatal defect in Kane County's arguments: the right to cross-examine provides a unique opportunity to demonstrate, out of the mouth of hostile parties or witnesses themselves, the error, inadequacy, or bias in another party's evidence with a force that the counter-statements of a party's own witnesses often simply do not carry. Because the right to cross-examine is statutorily guaranteed in formal adjudicatory proceedings under the Board's organic statute, the Board may not adopt summary judgment or any other procedural device that impairs or eliminates a party's right to cross-examine.

Petitioners acknowledge the statement in the Utah Administrative Procedures Act that:

> This chapter **does not preclude** an agency, prior to the beginning of an adjudicative proceeding, or the presiding officer during an adjudicative proceeding from granting a timely motion to dismiss or for summary judgment if the requirements of Rule 12(b) or Rule 56 of the Utah Rules of Civil Procedure are met by the moving party, except to the extent that the requirements of those rules are modified by this chapter.

Utah Code § 63G-4-102(4)(b) (emphasis supplied). The quoted language does not, however, authorize this Board to grant summary judgment in contravention of the statutory cross-examination right of litigants established under the Board's organic statute. Instead, the quoted

language simply clarifies that nothing in the Utah Administrative Procedures Act bars entry of summary judgment in formal adjudicative proceedings. The quoted language, which applies to formal adjudicative proceedings generally, cannot reasonably be interpreted to trump the more specific provisions of this Board's organic statute, which concerns only the class of formal adjudicative proceedings that review approval of applications for permits to conduct surface coal mining operations and other matters arising under Utah's approved state regulatory program for implementing the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 ("SMCRA"). *State v. Hamblin*, 676 P.2d 376, 378 (Utah 1983) ("A specific statute controls a general one."); *see also Floyd v. Western Surgical Associates, Inc.*, 773 P.2d 401, 404 (Utah App. 1989) *citing State v. Burnham*, 49 P.2d 963, 965 (Utah 1935) ("Under general rules of statutory construction, where two statutes treat the same subject matter, and one statute is general while the other is specific, the specific provision controls.").

It is important to note that the Board's organic statute, unlike the Utah Administrative Procedures Act, does not establish a procedure for obtaining summary judgment or summary decision prior to an evidentiary hearing in formal adjudicative proceedings. Because express provisions for summary judgment or summary decision are very commonly included in civil procedural systems in the United States, including civil adjudications in the Utah state court system, *see* Rule 56 of the Utah R. Civ. P. 56, Fed. R. Civ. P. 56, 43 C.F.R. 4.1125 (authorizing federal administrative law judges to enter summary decision in administrative review proceedings under SMCRA), the absence of any authorization of summary judgment or summary decision in the Board's organic statute forcefully underscores the express statutory requirement that this Board afford every litigant the right of cross-examination and,

consequently, that this Board conduct an evidentiary hearing in every instance unless all parties waive that right.

As mentioned earlier the Board's organic statute does direct this Board to adopt procedural rules "which are in accordance with Title 63G, Chapter 4, Administrative Procedures Act." Tellingly, however, the procedural rules for formal adjudicative proceedings that this Board has adopted do not authorize summary judgment, presumably in recognition of the statutory cross-examination rights established in the organic statute. The fact that the Board's rules do not authorize summary judgment does not prevent them from being "in accordance with" the Utah Administrative Procedures Act because, as quoted above, that statute does not require agencies to authorize entry of summary judgment. Instead, the Utah Administrative Procedures Act simply clarifies that its provisions do not **preclude** agencies from entering summary judgments.

The basic authority of any Utah agency to grant summary judgment in formal adjudicative proceedings must come, if at all, from its organic statute. For all the reasons explained earlier in this section, this Board's organic statute does not authorize entry of summary judgment. Instead, it establishes cross-examination rights that are flatly incompatible with summary judgment. Accordingly, due to the absence of statutory or regulatory authority to enter summary judgment, this Board must deny ACD's motions out of hand and refuse to consider Kane County's arguments in support of those motions.

II.

Alternatively, This Board's Election Not to Adopt Regulations That Authorize Entry of Summary Judgment in Formal Adjudicative Proceedings Precludes Entry of Summary Judgment in This Case

Even if this Board's organic statute did not effectively preclude entry of summary judgment – which it does – that statute directs the Board to adopt rules to govern the conduct of hearings in matters such as this one. The Board has done so, without including in those rules any provision for entry of summary judgment. If that fact is not attributable to the Board's recognition that its organic statute contains provisions that are incompatible with summary judgment, then this Board simply chose not to include summary judgment as a means of resolving some or all of the issues that arise in formal adjudicative proceedings. As with every other component of the approved state regulatory program for SMCRA, the federal Office of Surface Mining Reclamation and Enforcement ("OSM") approved this Board's regulations – absent any provision for summary judgment – as consistent with SMCRA and its implementing federal regulations.

To the extent that the Board has statutory authority to provide for entry of summary judgment in coal mining matters – which, again, it does not – the Board's organic statute still requires the Board to implement that authority, if at all, through the adoption of rules. At this juncture, no rule authorizing summary judgment in coal mining cases before this Board may take effect unless and until OSM approves the proposed new rule following notice and public comment. 30 C.F.R. § 732.17(g). Thus, because the Board has previously elected not to adopt rules authorizing entry of summary judgment in coal mine cases, and because the Board cannot reasonably expect to obtain approval of any regulatory change prior to ruling on ACD's pending

summary judgment motions, the Board must deny those motions as unauthorized and refuse to consider Kane County's arguments in support of those motions.

III.

Alternatively, Utah Case Law Prohibits Entry of Summary Judgment Prior to Completion of Discovery

Even if this Board were fully authorized to entertain and grant motions for summary judgment – which it is not – ACD's motion for summary judgment and Kane County's arguments in support of those motions are fatally premature. The Supreme Court of Utah has held that "[l]itigants must be able to present their cases fully to the court before judgment can be rendered against them unless it is obvious from the evidence before the court that the party opposing judgment can establish no right to recovery." *Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles*, 681 P.2d 1258, 1261 (Utah 1984) (emphasis added); see also *Krantz v. Holt*, 819 P.2d 352, 356 (Utah 1991). The Supreme Court has further noted that:

> Prior to the completion of discovery, however, it is often difficult to ascertain whether the nonmoving party will be able to sustain its claims. In such a case, summary judgment should generally be denied.

See Pepper v. Zions First Nat'l Bank, N.A., 801 P.2d 144, 154 (Utah 1990) (summary judgment premature since nonmoving party might be able, through additional discovery, to prove different theories of recovery); *Cox v. Winters*, 678 P.2d 311, 315 (Utah 1984) (summary judgment not proper before nonmoving party has carried "already-begun discovery proceedings to completion"); *Auerbach's, Inc. v. Kimball*, 572 P.2d 376, 377 (Utah 1977) (summary judgment premature because nonmoving party's discovery not yet complete).

In this case, Petitioners have timely moved for leave to conduct discovery, but as yet have not received authority to conduct any discovery at all. Among the material facts that Petitioners seek to discover are:

(1) whether ACD or the Division are in possession of additional baseline hydrologic data concerning the permit or cumulative impact areas;

(2) whether the laboratory reports, field notes, or monitoring logs associated with baseline hydrologic data that ACD or the Division have made public verify reported data or, alternatively, demonstrate that reported data are flawed;

(3) whether ACD's data collection procedures satisfy established norms or constitute unexplained and unjustified departures from acceptable practice;

(4) similarly, whether the Division's evaluation of ACD's baseline hydrologic data comported with established norms or constituted unexplained and unjustified departures from acceptable practice;

(5) the basis of the numerous factual disputes and less-than-fully-explained defenses contained in the responses of ACD and the Division to Petitioners' request for agency action;

(6) whether Petitioners physical inspection of the pertinent permit and cumulative impact areas will reveal additional inaccuracies or incompleteness in ACD's permit application; and

(7) whether the Division's approval of ACD's inaccurate and incomplete permit application occurred, in whole or in part, as the result of political pressure placed on Division personnel by the Governor's office.

Under the legal precedents discussed above, granting ACD's motion for summary judgment prior to Petitioners' completion of this requested discovery would constitute clear legal error.[1]

IV.

Alternatively, Kane County Is Not Entitled to Judgment As a Matter of Law On the Issues that Kane County Raises in Its Memorandum

Even if summary judgment were otherwise appropriate—which it certainly is not—Kane County has not demonstrated that it is entitled to judgment as a matter of law on any of the substantive issues that it raises in its memorandum. To the contrary, the governing law favors Petitioners in every instance.

A. The Economic Impact on Kane County of a Decision to Deny Approval of ACD's Permit Application Is Not a Relevant Factor That Congress or the Utah Legislature Meant for This Board to Consider in Coal Mine Permitting Cases

The sole issues in this proceeding are whether ACD and the Division complied with the permit application and evaluation regulations. A consideration of economic impact does not enter into this determination because neither SMCRA, nor Utah's regulations implementing SMCRA, lists economic impact as a factor for the Board to consider. SMCRA, 30 U.S.C. §§ 1201-1328; Utah Code § 40-10-1 *et seq.* Thus, any economic harm to Kane County is solely due to the failure of ACD and the Division to comply with the permit application and evaluation regulations.

Furthermore, Kane County's allegation of economic harm is undercut by two Supreme Court decisions, *Hodel v. Indiana*, 452 U.S. 314 (1981), and *Hodel v. Virginia Surface Mining*

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[1] Petitioners' need to conduct discovery provides a short, completely sufficient answer to Kane County's repeated assertions that Petitioners have not produced evidence to support their allegations. Although the Declaration of Elliott Lips that accompanies Petitioners' memorandum in opposition to ACD's summary judgment motions provides a wealth of evidence in support of Petitioners' baseline hydrology claims, nothing in prior

and Reclamation Association (Hodel v. VSMRA), 452 U.S. 264 (1981), both of which support Petitioners' arguments that claims of economic harm are irrelevant in cases such as this one that challenge the constitutionality of SMCRA and its state implementing programs. In these two decisions, decided shortly after the passage of SMCRA, the Court affirmed the constitutionality of various provisions of SMCRA.[2] *Hodel v. Indiana*, 452 U.S. at 317; *Hodel v. VSMRA*, 452 U.S. at 268. In *Hodel v. VSMRA*, the Court explained that although SMCRA may impact state and local economies, economic impacts are not a determinative factor and are insufficient to establish a constitutional violation. 452 U.S. at 292, n. 35.

Even if economic impact was a factor that this Board could consider—which it is not—the Board could not rely on the document Kane County submitted as Exhibit A for proof that the County will suffer economic harm. This exhibit is not supported by an accompanying affidavit attesting to its authenticity or describing how or by whom the projections were compiled.

In sum, the only matters at issue here are whether ACD and the Division complied with the governing regulations. Under Utah's regulatory program implementing SMCRA, economic impact must not enter into these deliberations. Furthermore, applicable Supreme Court precedent undercuts Kane County's reliance on economic claims and demonstrates that the County is not entitled to judgment as a matter of law.

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proceedings required Petitioners to present evidence. The time for that is after completion of discovery, when the Board or its hearing examiner convenes an evidentiary hearing.

[2] Kane County asserts, for a variety of reasons, that denial of ACD's permit would be unconstitutional. Despite these broad constitutional attacks, Kane County fails to cite to either of the controlling Supreme Court decisions, *Hodel v. Indiana* or *Hodel v. VSMRA*, that definitively affirm the constitutionality of SMCRA.

B. Consideration of Fifth Amendment Takings Claims Is Not Appropriate in This Proceeding But, Alternatively, Such Claims Are Foreclosed by Prior Decisions of the Supreme Court of the United States

Kane County raises two separate claims based on regulatory "takings" law, but the Board does not have jurisdiction to adjudicate "takings" defenses in proceedings such as this one. The Utah Supreme Court has repeatedly emphasized that only courts, not administrative boards, have jurisdiction to address constitutional questions, such as the Fifth Amendment takings claims raised by Kane County. *See, e.g.*, *Utah School Bds. Assn. v. Utah State Bd. of Educ.* 17 P.3d 1125, 1128 (Utah 2001) ("The power and duty of ascertaining the meaning of a constitutional provision resides exclusively with the judiciary"); *Utah Chapter of the Sierra Club v. Utah Air Quality Bd.*, 148 P.3d 960, 966 (Utah 2006) ("That the Board has been assigned some adjudicative functions does not implicitly give it any particular authority to interpret standing doctrine or other issues of general statutory, constitutional, or common law.").

Furthermore, the County lacks standing to assert its takings claims because it does not own the property in question, nor does it face liability for any taking that it suggests might occur. The Takings Clause of the U.S. Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. AMEND. V. The parallel provision of the Utah Constitution states that, "[p]rivate property shall not be taken or damaged for public use without just compensation." UTAH CONST. ART. 1, § 22. If private property is taken or damaged for public use without just compensation, only the *property owner* may bring a claim for compensation. *See Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.2d 1241, 1243–44 (Utah 1990); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). Kane County is not the owner of the property at issue in this case and thus cannot raise these claims.

Even if the Board had jurisdiction over these claims and Kane County had standing to raise them standing—neither of which is the case—the County's arguments lack substantive merit. Kane County's claim that the Fifth Amendment Takings Clause requires compensation is precluded by the Supreme Court decisions in *Hodel v. Indiana* and *Hodel v. VSMRA*. These rulings establish that neither the enactment of SMCRA, nor of the states' implementing programs that allow for the denial of permits that violate surface mining regulations, constitutes a taking. In both of these cases, the Court explained that passage of the challenged provisions of SMCRA does not constitute a taking because the provisions do not *prohibit* surface coal mining; they merely regulate when and how such mining may occur. 452 U.S. at 296; 452 U.S. at 335. Furthermore, SMCRA does not prevent other economically viable uses of land, and thus the Act does not deprive coal mining operators of all valuable use of their property. *Hodel v. VSMRA*, 452 U.S. at 296–97; *Hodel v. Indiana*, 452 U.S. at 335. Moreover, the United States Court of Appeals for the District of Columbia, in *National Mining Association v. Kempthorne,* 512 F.3d 702, 711–12 (D.C. Cir. 2008) cert. denied 129 S.Ct. 624 (Dec. 1, 2008), upheld, against a takings challenge, SMCRA's complete ban on mining in certain sensitive areas. *See* SMCRA, 30 U.S.C. § 1272(e). These authoritative cases affirming the constitutionality of SMCRA foreclose Kane County's takings arguments.

Despite these definitive holdings, the courts left open the possibility that future coal mine operators could attempt to show that, as applied to specific lands, SMCRA constitutes a taking that requires compensation. *Hodel v. VSMRA*, 452 U.S. at 297, n. 42; *Hodel v. Indiana*, 452 U.S. at 334–35. This narrow opportunity to raise site-specific challenges is foreclosed here because ACD does not have an established property right, but only a "Proposed Permit" and the hope that it will be granted a legal property right. Letter from John Baza, Division of Oil, Gas, & Mining

to Chris McCourt, Alton Coal Development, LLC (October 19, 2009). Utah and U.S. Supreme Court cases clarify that, for a taking to occur, a property owner must have more than a mere unilateral expectation of a property right. *Patterson v. American Fork City*, 67 P.3d 466, 473 (Utah 2003); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). ACD has only a mere expectation of a property right, and thus has no property that could be taken.

C. Consideration of the Contract Clause of the Constitution Is Not Appropriate in This Proceeding, But, Alternatively, Such Claims Are Foreclosed by Prior Decisions of the Supreme Court of the United States

Kane County raises two claims based on constitutional contract law. However, consideration of Kane County's claims arising under the Contract Clause of the U.S. Constitution is not appropriate for consideration by this Board. As previously explained, the Board does not have jurisdiction to adjudicate issues of constitutional law, including the question of whether the Contract Clause of Article 1, Section 10 of the U.S. Constitution applies to this proceeding. And, just as Kane County lacked standing to raise takings claims, the County lacks standing to raise contractual issues because Kane County does not possess any contracts. ACD, the party that does possess a "Proposed Permit," has not raised any contractual claims, and Kane County does not have authority to raise contractual claims for another party. Even assuming this were not the case—which it is—Kane County's claims lack substantive merit.

Kane County claims that the Contract Clause, which provides, in relevant part, that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts," protects ACD's interests in the proposed mining operation. U.S. Const. ART. 1, § 10. However, the Supreme Court has interpreted the Contract Clause to refer very narrowly to "legislation that was designed to repudiate or adjust pre-existing debtor-creditor relationships that obligors were unable to

satisfy." *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 503 (1987). The Court has emphasized that this Clause should not be interpreted literally and that it has fallen into disuse in modern constitutional jurisprudence. *Id.* at 502–03. Thus, not surprisingly, the vast majority of the cases cited by Kane County to support its constitutional contractual arguments were decided in the 1800s.

Indeed, numerous Supreme Court decisions issued subsequent to the cases cited by Kane County have clarified that the Contract Clause should not be read to mean that everyone who has entered into a contract has the right to ignore constitutional statutes such as SMCRA. *See, e.g.*, *Keystone Bituminous Coal Assn.*, 480 U.S. at 502–03; *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934). In addition to the Supreme Court's narrow reading of the Contract Clause, Kane County's arguments are further limited by the *Hodel* cases which conclusively affirm the constitutionality of SMCRA. In its brief, Kane County claims that the Contract Clause requires the Board to approve ACD's permit even though it acknowledges that states have broad authority under their police powers to enact regulations, such as Utah's regulatory program implementing SMCRA, that affect public health, safety, and welfare. While no claim was explicitly brought under the Contract Clause in either of the *Hodel* cases, *Hodel v. VSMRA* unequivocally held that the enactment of SMCRA was a legitimate exercise of Congress' commerce power and that the Act is constitutional even if it preempts laws that have been enacted under a state's police powers. 452 U.S. at 290–92. In contrast to Kane County's assertions, the Contract Clause does not preempt a state's police powers to enact regulations such as Utah's regulatory program implementing SMCRA, nor does it limit the regulation of interstate commerce, or the

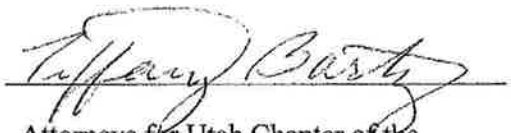
enforcement of SMCRA and other statutes that were legitimately enacted under Congress' commerce power. *Keystone Bituminous Coal Assn.*, 480 U.S. at 502–03.

For all of these reasons, even if summary judgment were otherwise appropriate—which it certainly is not—applicable law favors Petitioners on every substantive issue of constitutional contracts law and Kane County is not entitled to judgment as a matter of law on these issues.

WHEREFORE, Petitioners request that the Board deny ACD's motions for summary judgment despite Kane County's separate arguments in support of those motions.

Dated: January 25, 2010

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of January, 2010, I served a true and correct copy of **PETITIONERS' MEMORANDUM IN RESPONSE TO THE MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT FILED BY KANE COUNTY, UTAH** to each of the following persons via e-mail transmission:

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